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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

PATRICK J. HURLEY, SECRETARY OF WAR, ET AL.,
petitioners

v.

R. FOSTER KINCAID, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Patrick J. Hurley, Secretary of War; Major General Lytle Brown, Chief of Engineers, United States Army; the Mississippi River Commission; Brigadier General T. H. Jackson, Charles H. West, Robert L. Faris, Edward Flad, John H. Stipes, Colonel Jarvis Bain, Major Ernest Graves, members of the Mississippi River Commission; and Major John C. H. Lee, District Engineer, petitioners, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the cause between the above-

named parties on May 15, 1931, affirming the decree of the District Court for the Western District of Louisiana, which perpetually enjoined the petitioners from "carrying out the plan adopted by the Act of Congress, approved May 15, 1928, known as the Mississippi River flood control act, in the Boeuf Basin floodway, including all levee work or levee construction and the awarding and letting of contracts for the same, unless and until the property of the said complainant [the respondent here] has been acquired by the United States Government or the flowage rights over the same acquired either by purchase or condemnation for such purpose." (R. 120, 121.)

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the Flood Control Act of May 15, 1928, requires the United States to acquire respondent's property, or flowage rights over the same, before entering upon the construction, in the so-called Boeuf Basin, of levees and other works authorized by that Act.

2. Whether the action taken by the petitioners, who have merely advertised for and received bids for the construction of portions of the work to be performed in the Boeuf Basin under the Flood Control Act, constitutes a taking of respondent's property for which he is entitled to compensation under that Act or under the Federal Constitution.

3. Whether the respondent has presented a case for equitable relief.

4. Whether the United States is an indispensable party to the suit.

STATUTE INVOLVED

The Act of May 15, 1928, c. 569, 45 Stat. 534, known as the Flood Control Act, is set forth in Appendix A, pp. 28–38, *infra*.

STATEMENT

The respondent sued in the District Court to enjoin the United States and the petitioners from constructing certain levees and other works contemplated by the Flood Control Act of May 15, 1928, pp. 28–38, *infra*. (R. 1–8.)

The bill alleged that by virtue of the Act of May 15, 1928, the United States had adopted a project for the flood control of the Mississippi River; that this project "differed from the old flood control system of * * * levees only, by the creation of certain diversion channels" (R. 2); that the petitioners, pretending to act by authority of the Act of May 15, 1928, were preparing to construct, and had advertised and received bids for the construction of, a floodway or diversion channel, known as the Boeuf Floodway, the purpose of which was to divert water from the main channel of the Mississippi River and to carry it through the floodway to some other point; that under the plan proposed the main levee of the river will be raised above and below the area of connection with the Boeuf Flood-

way so as to constitute a "fuse-plug levee," so called, for the purpose of having water break over the same at flood tide and flood the diversion channel; that guide levees are to be constructed on each side of this flood way, extending from Cypress Creek to the Red River; that the construction of these guide levees will make a pocket for the flow of water diverted from the Mississippi River; and that this diverted water will destroy the value of all property situated within the flood area (R. 3, 4).

The bill further alleged that the respondent owns land within the flood way, improved with buildings and used for agricultural purposes, valued at $9,000; that such land is now protected from the waters of the Mississippi River "if the levees hold"; that if the proposed guide levees are constructed respondent's land will be subject to overflow in time of flood and thus rendered unfit for agricultural or other purposes; that this action of the petitioners will amount to a taking of respondent's property without due process of law and without just compensation; and that the acts of the petitioners in setting apart the property in question as a floodway and advertising for and receiving bids for the construction of the guide levees have cast a cloud upon the respondent's title to his land and have impaired his use of the same. (R. 4-5.)

The bill also averred that although the Fifth Amendment to the Federal Constitution and Sec-

tion 4 of the Flood Control Act require that the respondent be compensated for the taking of his property the petitioners have made no efforts to purchase or obtain his property by condemnation or otherwise. The bill prayed that the petitioners and the United States be perpetually restrained from carrying out any work on the Boeuf Floodway under the proposed plan. (R. 6–7.)

The defendants in the District Court moved to dismiss the bill on the grounds, among others, (1) that the action was one against the United States, (2) that the court was without jurisdiction, (3) that the bill disclosed no ground for equitable relief, and (4) that the bill disclosed no cause of action. (R. 8–9.) The District Court, construing the bill as charging that the petitioners were proceeding in violation of both the Flood Control Act and the Constitution, held that the United States could not or need not be a party, and that it should be dismissed as a party. (R. 10–15.) The court overruled the motion to dismiss the suit on the ground that the Flood Control Act required the United States to condemn or acquire flowage rights over the respondent's property before going ahead with the flood-control project in the Boeuf Basin. (R. 15–27.)

Thereupon the petitioners answered the bill, putting in issue its material allegations. (R. 27–29.) After a trial, the District Court found that under the proposed plan when the Mississippi

River reaches such a stage that the so-called fuse-plug levee will break, about one-third of the water passing that point will be turned in the Boeuf Basin (R. 109); that with a flood at the maximum estimated by the plan the water might reach a height of 16.4 feet on the respondent's land (R. 110); that under the plan the respondent's property will be burdened and other property benefited (R. 111); and that "additional flood waters" will be diverted thereon (R. 112). The court found that the plan constituted a taking of rights with respect to the respondent's property, and that although the physical occupancy of the land would not occur until the land had been overflowed in time of flood, "the process of subjecting it to that service and the taking possession in so far as is either necessary or contemplated by the act will begin with the construction of the first levee or works which are intended to direct the water upon the land." (R. 115.) The court thereupon enjoined the petitioners "from proceeding with the construction authorized by or carrying out the plan * * * unless and until the property of the said complainant has been acquired by the United States Government or the flowage rights over the same acquired either by purchase or condemnation for such purpose." (R. 121, 122.)

Upon appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed "For reasons stated in opinions rendered by the District Judge." (R. 131, 132.)

Uncontradicted testimony established the following facts, although all of them were not specifically found by the District Court:

The principal features of the flood-control plan in the lower Mississippi Valley, as authorized by the statute, are shown on the map at page 129 of the record. It is proposed to raise the levees along the main channel of the river about three feet wherever the double brown line is shown on the map. (R. 69.) At the head of the Boeuf Basin, which is really a part of the Tensas Basin, it is proposed to raise the levees on the south bank of the Arkansas River, the levees on the west bank of the main channel of the Mississippi River south of Luna Landing, and the levees on the opposite side of the river. The so-called "Cypress Creek fuse-plug levee" is that portion of the levee on the west bank of the main channel between Rohwer and Luna Landing. (R. 40, 101.) This levee, under the plan, is to remain at the present height. (R. 101.) The proposed guide or protection levees in the Boeuf Basin, west of the Mississippi River, are clearly indicated on the map by brown lines. The west protection levee begins, on the north, at Rohwer and extends southerly to Windsor, where it is interrupted by high land. Its continuation is the loop levee surrounding the city of Monroe. (R. 69.) The east protection levee begins, on the north, at Luna Landing and runs southerly to high ground just south of Chicot. This portion of the levee is

designed to prevent any flow of flood waters through the Tensas Basin. (R. 35, 36, 43.) The east levee starts again from the high ground just north of Terry and proceeds southerly to Wisner. (R. 69.)

The respondent's land is located in the lower edge of the Boeuf Basin, twenty miles from the proposed east levee, forty-five miles south of Monroe, and about 125 miles from the fuse-plug levee. (R. 32, 33, 40, 105.) The difference in elevation between the fuse-plug levee and the respondent's land is about eighty feet. The land in question consists of 160 acres, improved with houses and barns, and was valued at approximately $9,000 prior to the enactment of the Flood Control Act. (R. 30, 31.) The respondent's land was partially flooded in 1913, 1916, and 1922 (R. 31, 51, 105), and entirely flooded in 1882, 1912, and 1927 (R. 30, 31, 48, 51, 66, 105). In 1927 it was flooded for about six weeks to a height from four to twelve feet. (R. 30, 33, 49, 51, 59, 62, 105.)

The respondent's engineers testified that the result of the consummation of the flood-control plan would be to flood the respondent's land more frequently and to a greater extent than previously. (R. 34, 35, 38, 45, 49.) One witness testified that the land would be flooded about once every four years. It was the opinion of the respondent's engineers that if a flood as great as the 1927 flood should occur, the respondent's land would be flooded to a much greater extent than it was in 1927. (R.

34, 38, 43, 44.) One witness stated that under such circumstances twice as much water would go down the Boeuf Basin as in 1927. Another stated that with a flood equal to the 1927 flood the respondent's land under the plan proposed would be flooded at least 10 feet higher than in 1927.[1] (R. 34, 49.)

Evidence introduced by the respondent tended to show that the adoption by Congress of the Flood Control Act had made it difficult, if not impossible, to secure loans on farm lands situated similarly to the respondent's land (R. 51–52, 54, 55, 57, 58, 60–61), although most of the witnesses testified that the same condition had existed since the 1927 flood and prior to the adoption of the flood-control plan (R. 53, 54, 55). The respondent has not attempted to sell or secure a loan upon his land since the enactment of the statute. (R. 32.)

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[1] Government engineers testified that lands between the protection or guide levees in the Boeuf Basin would continue to have under the proposed plan the same protection that they now have (R. 73); that consummation of the plan would have no harmful effect upon respondent's land (R. 71, 72, 97); that less water would leave the main channel of the Mississippi River than before (R. 72, 73, 94, 99, 100, 103, 105); and that the carrying capacity of the main channel of the river would, under the plan, be tremendously improved, by revetment work and otherwise, so that when the plan is completed the main channel of the river will be able to carry much more water than is now the case (R. 75, 89, 91, 94, 97, 99, 105). These engineers testified that under the plan when completed the respondent's land would not be flooded more often than once in twelve or thirteen years. (R. 72, 95, 97, 99.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that this was not a suit against the United States.

2. In holding that the United States was not a necessary party.

3. In holding that the District Court had jurisdiction.

4. In holding that the bill of complaint presented a case for equitable relief.

5. In holding that respondent did not have an adequate remedy at law.

6. In holding that the Flood Control Act of May 15, 1928, requires the United States to pay for flowage rights over respondent's property before proceeding with the construction in the Boeuf Basin of the projects authorized by the Act.

7. In holding that the construction by the United States of flood-control works in the Boeuf Basin, as provided by the Act of May 15, 1928, would amount to a taking of respondent's property in violation of that Act and the Fifth Amendment to the Constitution of the United States.

8. In finding that under the proposed plan for flood control "additional destructive flood waters" will be "diverted" over the respondent's land.

9. In affirming the decree enjoining petitioners.

REASONS FOR GRANTING THE WRIT

1. The respondent's land is located in what is known as the Boeuf Basin. This basin, like the Atchafalaya Basin, has always been subject to

flooding in the event of overflow from the main channel of the Mississippi River. One of the main features of the Mississippi flood-control plan authorized by the Act of May 15, 1928, is the construction of guide or protection levees in these basins, which levees limit the floodable area thereof. Since the levees now existing along the main channel of the Mississippi River which protect the Boeuf Basin are not to be lowered or impaired, so that under the proposed plan the Boeuf Basin will continue to have the same levee protection it now has, the War Department has never considered that the United States is required, either under or apart from the Flood Control Act, to condemn or acquire flowage rights over lands such as the respondent's land, and no provision has been made, financially or otherwise, for such condemnation or acquisition. Although the matter is not susceptible of accurate determination, the office of the Chief of Engineers of the War Department has estimated that in the Boeuf and Atchafalaya Basins alone there are approximately four million acres of land located, with respect to contemplated diversion channels, similarly to the respondent's land. And while it is impossible to estimate the amount of money necessary to condemn or to acquire flowage rights over such property, unquestionably a tremendous sum would be required, probably several hundred millions of dollars. Meanwhile, the decision in the instant case has suspended the carrying out of the plan in the Boeuf Basin. The determination of the questions pre-

sented in the instant case is a matter of the greatest national importance.

2. The decision of the Circuit Court of Appeals is probably in conflict with *United States* v. *Lynah*, 188 U. S. 445; *Manigault* v. *Springs*, 199 U. S. 473; *Jackson* v. *United States*, 230 U. S. 1; *New York* v. *Illinois*, 274 U. S. 488, and other decisions of this Court, in holding that the respondent has presented a case for equitable relief. The decision of the Circuit Court of Appeals is probably in conflict with *In re Ayers*, 123 U. S. 443; *Belknap* v. *Schild*, 161 U. S. 10; *Louisiana* v. *Garfield*, 211 U. S. 70; *Wells* v. *Roper*, 246 U. S. 335; *Lambert* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, and other decisions of this Court, in holding that the United States was not a necessary party to the case.

3. The decision of the Circuit Court of Appeals is in direct conflict with an unreported decision of the United States District Court for the Eastern District of Missouri in *Kirk* v. *James W. Good, Secretary of War et al.*, decided July 11, 1929. See Appendix B, pp. 39–41, *infra*.

4. Several suits similar to the instant case and raising the questions here presented are now pending in various United States district courts in the Mississippi Valley, all of which cases are awaiting the final determination of the instant case.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1931.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court rendered upon the overruling of the defendants' motion to dismiss the bill of complaint (R. 10–27) is reported in 35 F. (2d) 235. The opinion of the District Court upon the merits (R. 108–116) is reported in 37 F. (2d) 602. The opinion of the Circuit Court of Appeals, adopting the opinions of the District Court (R. 130–131), is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1931. (R. 132.) On August 14, 1931, an order was signed by a Justice of this Court extending for sixty days the period within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED, STATUTE INVOLVED, ETC.

A statement of the questions presented, statute involved, assignment of errors relied upon, and a statement of the case will be found in the petition.

ARGUMENT

I

THERE HAS BEEN NO TAKING OF OR DAMAGE TO RESPONDENT'S PROPERTY FOR WHICH HE IS ENTITLED TO COMPENSATION EITHER UNDER OR APART FROM THE FLOOD CONTROL ACT

The Government contends that nothing which the petitioners have done or propose to do constitutes a

"taking" of the respondent's property. No actual physical invasion of the respondent's land has occurred or is about to occur. It is true that the United States has advertised for and received bids for the construction of certain parts of the work to be performed in the Boeuf Basin, but it will be several years before the work is completed, and then it may be many more years before a flood will occur of sufficient severity to flood the respondent's land. Viewing the findings of the District Court in their most favorable light as to the respondent, the only presently existing damage which is asserted or established is that the mortgage and sale value of the respondent's land have been affected by the proposed plan. These facts do not constitute a "taking" of the respondent's property.

This Court has frequently held, in respect to claims of damage arising from public improvements, that there must be "an actual invasion or appropriation of land as distinguished from consequential damage" before there is a taking of property within the meaning of the Fifth Amendment. *Bedford* v. *United States,* 192 U. S. 217, 225; *Manigault* v. *Springs,* 199 U. S. 473, 484–485; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Cubbins* v. *Mississippi River Commission,* 241 U. S. 351; *Jackson* v. *United States,* 230 U. S. 1, 23. Specifically with reference to injury to property from flood waters, it is established that there is a taking only "where the Government by the construction of * * * public works so floods lands belonging to an individ-

ual as to substantially destroy their value." United *States* v. *Lynah*, 188 U. S. 445, 470; *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320, 324–5 (C. C. A. 6th); *Coleman* v. *United States*, 181 Fed. 599 (C. C. N. D. Ala.). See *Kirk* v. *Good et al.*, Appendix B, pp. 39–41, *infra*. Where an injury from flood waters arising from the prosecution of a public improvement does not amount to a physical appropriation it is deemed to be merely consequential and therefore *damnum absque injuria* upon the principle that the general good must prevail over individual inconvenience.

Nor does it appear that there has been any damage to respondent's property for which the Flood Control Act provides compensation. The District Court relied upon Section 4 of the statute (p. 32, *infra*), which provides that—

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River.

The court stated that this language was ambiguous and that the Act did not make clear what was meant by the words "additional destructive flood waters that will pass by reason of diversions * * *." (R. 23, 112.) Section 3 of the statute (pp. 30–31, *infra*) provides that—

> No liability of any kind shall attach to or rest upon the United States for any damage from or by flood or flood waters at any place.

Unless this provision is to be discarded as meaningless it seems clear that Section 4 was not intended to provide for the acquisition of flowage rights over *all lands* which might conceivably be affected during unusual floods.

The proposed plan does not call for the deliberate diversion of flood waters in the Boeuf Basin through the fuse-plug levee. That levee, under the plan, is to remain exactly as it is. Although the adjoining levees are to be raised 3 feet, the significant fact is that the Boeuf Basin will have the same levee protection that it now has.[2] We submit that the phrase "additional destructive flood waters that will pass by reason of diversions" refers to situations where the proposed plan definitely contemplates deliberate diversions of flood waters from the main channel, through floodgates or lowered

[2] Paragraph 119 of the "Jadwin Plan." provides (see Senate Report 619, 70th Cong., 1st Sess.):

"The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years. The lands in the floodway will be inundated *only by floods that would overtop the present levee system, and they will retain the same measure of protection that they now have.*" (Italics ours.)

levees, over lands previously not subject to regular flooding.

Such lands are those included in the Bonnet Carre controlled spillway [3] and the Birds Point spillway,[4] where presently existing levee protection for the proposed spillways is eliminated or reduced. We contend that it is only to areas found in such spillways that the phrase "additional destructive flood waters that will pass by reason of diversions" applies. If this conclusion is sound, it is clear that the Flood Control Act does not contemplate the payment of compensation to owners of land situated as is the respondent's land.

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[3] Paragraphs 114 and 115 of the "Jadwin Plan" provide (see Senate Report 619, 70th Cong., 1st Sess.):

"At Bonnet Carre a controlled spillway emptying into a leveed flood way to Lake Pontchartrain is to be constructed capable of discharging 250,000 second-feet. * * *

"The Bonnet Carre spillway is so designed as to afford complete control of the discharge into Lake Pontchartrain. This discharge will be begun when the flood stage at New Orleans has reached 20 on the Carrollton gauge; it will be regulated to prevent the stage rising above 20, and will be cut off as soon as the stage has fallen below that figure. Past records indicate that its operation will be required about once in five years; and for a period of from one to three months during each flood. The discharge through the spillway, in a maximum flood, will be about 10 per cent of the total flow at that latitude. * * *"

[4] Paragraph 125 of the "Jadwin Plan" provides (see Senate Report 619, 70th Cong., 1st Sess.):

"The plan is to set back, about 5 miles, the west bank Mississippi River levee from Birds Point, opposite Cairo, to St. John Bayou, just east of New Madrid, 70 miles by river below Cairo, *and to lower the present river bank levee by 5 feet*, so that when the stage at Cairo reaches 55, the water

II

THE RESPONDENT HAS NOT PRESENTED A CASE FOR EQUITABLE RELIEF

Prior to the enactment of the Flood Control Act the respondent's land was flooded with more or less regularity. It was wholly or partially covered in 1912, 1913, 1916, 1922, and 1927. (R. 31, 33, 49, 51, 62, 66.) The decision of the District Court is predicated upon the assumption that when the proposed works in the Boeuf Basin are constructed, a situation will be created whereby, if floods of sufficient severity occur, the respondent's land will be overflowed and damaged, and upon the further assumption that if such floods occur the land will be overflowed to a greater degree than it would be if the proposed levees were not constructed.[8]

As pointed out above, no actual physical invasion of the respondent's land has occurred or is about to occur. Nor will the awarding of contracts for the construction of the proposed works or the actual

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will begin to flow into a wide flood way below. This enlarged channel will preclude any predicted flood from rising above the levees protecting Cairo. It will reduce the stages of a flood equal to that of 1927 so that the levees at Cairo will have at least a 3-foot freeboard. (Italics ours.) * * *."

[8] The Government's engineers testified that upon completion of the proposed plan less water would leave the river than before; that the carrying capacity of the river will be greatly improved by revetment works and otherwise; and that, upon a conservative estimate, the lands in the Boeuf Basin will not be overflowed more than once in twelve or thirteen years. See footnote 1, p. 9, *supra*.

construction thereof constitute such an invasion. The respondent's use of his land has not been interfered with. Although the District Court found that the acts already undertaken by the petitioners have "for the present at least, affected materially the sale and mortgage value of property between the proposed levees" (R. 115), it is not shown that this situation does not prevail with respect to lands outside of the levees, and the respondent concedes that he has made no attempt since the Flood Control Act to sell his land or to secure a loan thereon (R. 32). It is not shown that the construction of the levees has been started or even that land has been acquired upon which to construct them. All that appears is that the United States has advertised for and received bids for the construction of certain parts of the work. (R. 29.) Unquestionably it will be years before the flood-control plan will be completed, and then it is highly conjectural when a flood of sufficient severity will occur to cause an overflow upon the respondent's land.

In these circumstances we submit that the respondent's bill of complaint was not based upon any actual or threatened impairment of his rights but "upon assumed potential invasions." *Arizona* v. *California*, 283 U. S. 423, 462. The respondent's suit is for an injunction, and, as pointed out by this Court in *New York* v. *Illinois*, 274 U. S 488, 489, 490, this is "a form of relief which must rest on an actual and presently threatened inter-

ference with the rights of another." *Cf. New Jersey* v. *Sargent*, 269 U. S. 328.

Moreover, it is well established that where there has been no actual taking or physical invasion of one's property by reason of the construction of an authorized public improvement, an injunction will not issue to interfere with the consummation of such project. *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351; *Manigault* v. *Springs*, 199 U. S. 473; *Osborne* v. *Missouri Pacific Ry.*, 147 U. S. 248, 259; *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320, 326–327 (C. C. A. 6th); *Childs* v. *City of Chicago*, 279 Ill. 623; *Lemon* v. *Drainage District*, 310 Mo. 171, 179. The theory underlying these cases is that the peculiar nature of works of public importance and the possibility of serious injury that may result from interference therewith requires that the jurisdiction to enjoin such works be exercised with the greatest caution and only when necessary to prevent irreparable injury.

In *Manigault* v. *Springs*, 199 U. S. 473, *supra*, the defendants were authorized by a state statute to erect a dam across a stream. The statute provided that they should be liable for all damage caused by erection of the dam. The plaintiff sued to enjoin the construction of the dam on the ground that it would cause the stream to overflow his land. Although this Court found that the erection of the dam would injure the plaintiff's land, it denied an injunction and said (p. 485)—

> a court of equity is not bound to enjoin a public work authorized by statute until compensation is paid, *where no property is directly appropriated.* This is particularly true where the damage is difficult of ascertainment at the time and a reasonable provision is made by the law for compensation. (Italics ours.)

In Point I, *supra,* we contend that the respondent has not presented a case which entitles him to compensation for damages. But assuming that he is entitled to damages, we submit that he has an adequate remedy at law. If the respondent is correct in his contention that the consummation of the flood-control project will result in a taking of his property for which he is entitled to compensation under the Fifth Amendment, or in his contention that the Flood Control Act provides for payment to him of the value of "flowage rights" over his property, an implied contract would exist which would permit him to sue the United States in the Court of Claims or in the District Court under the Tucker Act for the value of the property so taken or the damages resulting. *Portsmouth Co.* v. *United States,* 260 U. S. 327, 330; *United States* v. *Lynah,* 188 U. S. 445, 464–466; *Ferris* v. *Wilbur,* 27 F. (2d) 262, 264 (C. C. A. 4th).

Assuming that Section 4 of the statute requires the United States to acquire flowage rights over respondent's land, we submit there is nothing in the statute which contemplates that such rights

must be acquired as a condition precedent to proceeding with the construction of the proposed control works, or which permits any owner of land within the area of the Boeuf Basin to stop the work of construction until flowage rights over his land has been acquired. Section 4 provides, p. 32, *infra*, that—

> The Secretary of War *may* cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, *in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project*, * * *. (Italics ours.)

This language clearly vests discretion in the Secretary and Chief of Engineers, *in the first instance*, to determine what lands or rights are needed. As to many tracts of land within the general area of the Boeuf Basin questions of fact will arise, if Section 4 is applicable to this area, as to whether flowage rights with respect thereto are necessary. The initial determination of what rights are needed and the determination of the time when they should be required is expressly vested in the Secretary of War and the Chief of Engineers. It is illogical to contend, we submit, that any owner of land within the extensive area of the Bouef Basin can hold up the entire flood-control plan with a suit for injunction until it is determined whether or not the statute requires the acquisition of flowage rights over such land; and if so, until such rights have

been paid for. If the Secretary and Chief of Engineers neglect to condemn flowage rights which should be acquired, the property owner is not without remedy, since he may sue in the Court of Claims to recover the value of such rights.

III

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION SINCE THE UNITED STATES WAS AN INDISPENSABLE PARTY THERETO AND HAD NOT CONSENTED TO BE SUED

Although the bill of complaint was expressly directed "against the United States Government" (R. 1), the District Court held that the United States was not a necessary or proper party and that it should be dismissed from the suit (R. 15). But if the United States is right in its first contention that there has been no taking of or damage to respondent's property for which he is entitled to compensation under the Flood Control Act, or in its second contention that the Flood Control Act does not make the acquisition of the "flowage rights" therein directed to be secured a condition precedent to beginning work on the flood-control plan, then the petitioners were not acting in violation of the statute. If the petitioners were not acting illegally, no cause of action against them as individuals existed, and the United States was an indispensable party to the suit.

Whether an action is one against the United States, and therefore subject to the rule that it may not be maintained unless the United States has con-

sented to be sued, is determined by the effect of the decree or judgment which can or may be rendered therein. *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Kansas* v. *United States,* 204 U. S. 331, 341; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386–387; *Smith* v. *Reeves,* 178 U. S. 436, 438–439. It has been held that even though the United States is not named as a party the action is one against the United States where the individual defendants have no personal interest in the controversy, where the relief sought is against the named defendants only in their official capacity, and where the United States is "the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 123 U. S. 443, 506; *Belknap* v. *Schild,* 161 U. S. 10, 25; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386. It is well established that the United States is an indispensable party if the action is one which may "interfere with the performance of governmental functions and vitally affect interests of the United States." *Morrison* v. *Work,* 266 U. S. 481, 485–486; *Lambert* v. *Balto. & Ohio R. R. Co.,* 258 U. S. 377, 383; *Hopkins* v. *Clemson College,* 221 U. S. 636, 642; *Oregon* v. *Hitchcock,* 202 U. S. 60, 62; *Belknap* v. *Schild,* 161 U. S. 10, 18; *New York Guaranty Co.* v. *Steele,* 134 U. S. 230, 232.

That the instant case falls within the rules of the decisions cited seems clear. The relief sought against the defendants other than the United States was sought against them only in their official capacity. They had no individual interest in

the controversy, and assuming that their acts were authorized and directed by the statute, as we contend (pp. 21–23), they were under no personal liability for the performance of their duties. The effect of the decree entered by the District Court is to suspend the operation of an act of Congress and to inhibit the accomplishment of a governmental function of the greatest importance. Under the decree it is necessary for the *"United States Government"* (R. 121, 122) to take affirmative action to acquire flowage rights not only in the respondent's land but in many thousands of acres of other land (R. 87) located in the Boeuf Basin. Thus the present suit is one which "vitally affects the interests of the United States," and accordingly the United States was an indispensable party.

It is true that in a proper case a suit may be brought against officers of the United States to compel the performance of some ministerial duty (*Payne* v. *Central Pacific Railway Company,* 255 U. S. 228, 236; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386), or to establish a personal liability against such officers in an action of tort for wrongs inflicted by such officers, even though acting by authority of the United States (*Belknap* v. *Schild,* 161 U. S. 10, 18), or to restrain such officers from enforcing an unconstitutional statute (*Lipke* v. *Lederer,* 259 U. S. 557; *Osborn* v. *Bank of United States,* 9 Wheat. 738), or to restrain an illegal act

if such act involves an evasion or denial of a definite right of the plaintiff or operates to cast a cloud upon the title to his property. (*Morrison* v. *Work*, 266 U. S. 481, 487; *Lane* v. *Watts*, 234 U. S. 525.) These and similar principles relied upon by the District Court (R. 15) are, we submit, not applicable to the instant case, where the petitioners are not acting illegally, where the rights of the United States are necessarily involved, and where the decree actively interferes with important governmental functions.

In the instant case the constitutionality of the statute involved is not questioned. (R. 14.) The petitioners are expressly directed by the statute to construct the very levees which they are enjoined from constructing by the District Court. But the District Court held that under the statute the petitioners can not proceed with the project until the respondent's land has been condemned or flowage rights over the same acquired. If the respondent is entitled to compensation for a taking of his land, such compensation must necessarily be paid by the United States. The issue involves a substantial right of the United States. It "can not be tried behind its back." *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78. *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222.

The bill of complaint should have been dismissed since the United States has not given its consent to be sued. *Kansas* v. *United States*, 204 U. S. 331, 333; *Louisiana* v. *McAdoo*, 234 U. S. 627, 628–629.

CONCLUSION

We submit that the decision of the courts below is erroneous and in conflict with decisions of this Court. The questions presented are of the greatest importance and their final determination is necessary for the accomplishment of the Mississippi River flood-control program. We respectfully submit that the writ should be granted.

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OCTOBER, 1931.

APPENDIX A

The Mississippi River Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may

be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided,* That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further,* That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be

expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided,* That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: *Provided,* That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

SEC. 5. Subject to the approval of the heads of the several executive departments concerned, the Secretary of War, on the recommendation of the Chief of Engineers, may engage the services and assistance of the Coast and Geodetic Survey, the Geological Survey, or other mapping agencies of the Government, in the preparation of maps required in furtherance of this project, and funds to pay for such services may be allotted from appropriations made under authority of this Act.

SEC. 6. Funds appropriated under authority of section 1 of this Act may be expended for the prosecution of such works for the control of the floods of the Mississippi River as have heretofore been authorized and are not included in the present project, including levee work on the Mississippi River between Rock Island, Illinois, and Cape Girardeau, Missouri, and on the outlets and tributaries of the Mississippi River between Rock Island and Head of Passes in so far as such outlets or tributaries are affected by the backwaters of the Mississippi: *Provided,* That for such work on the Mississippi River between Rock Island, Illinois, and Cape Girardeau, Missouri, and on such tributaries the States or levee districts shall provide rights of way without cost to the United States, contribute 33⅓ per centum of the costs of the works, and maintain them after completion: *And provided further,* That not more than $10,000,000 of the sums authorized in section 1 of this Act, shall be expended under the provisions of this section.

In an emergency, funds appropriated under authority of section 1 of this Act may be be expended for the maintenance of any levee when it is demonstrated to the satisfaction of the Secretary of War that the

levee can not be adequately maintained by the State or levee district.

SEC. 7. That the sum of $5,000,000 is authorized to be appropriated as an emergency fund to be allotted by the Secretary of War on the recommendation of the Chief of Engineers, in rescue work or in the repair or maintenance of any flood-control work on any tributaries of the Mississippi River threatened or destroyed by flood including the flood of 1927.

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the

office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be $10,000 per annum, and the salary of the other members of the commission shall hereafter be $7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

SEC. 10. That it is the sense of Congress that the surveys of the Mississippi River and its tributaries, authorized pursuant to the Act of January 21, 1927, and House Document Numbered 308, Sixty-ninth Congress, first session, be prosecuted as speedily as practicable, and the Secretary of War, through the Corps of Engineers, United States Army, is directed to prepare and submit to Congress at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and tributaries, the Yazoo River and tributaries, the White River and tributaries, the Saint Francis River and tributaries, the Arkansas River and tributaries, the Ohio River and

tributaries, the Missouri River and tributaries, and the Illinois River and tributaries; and the reports thereon, in addition to the surveys provided by said House Document 308, Sixty-ninth Congress, first session, shall include the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to receive and hold waters from such reservoir; the prospective income from the disposal of reservoired waters; the extent to which reservoired waters may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation: *Provided,* That before transmitting such reports to Congress the same shall be presented to the Mississippi River Commission, and its conclusions and recommendations thereon shall be transmitted to Congress by the Secretary of War with his report.

The sum of $5,000,000 is hereby authorized to be used out of the appropriation herein authorized in section 1 of this Act, in addition to amounts authorized in the River and Harbor Act of January 21, 1927, to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers for the preparation of the flood-control projects authorized to be submitted to Congress under this section: *Provided*

further, That the flood surveys herein provided for shall be made simultaneously with the flood-control work on the Mississippi River provided for in this Act: *And provided further,* That the President shall proceed to ascertain through the Secretary of Agriculture and such other agencies as he may deem proper, the extent to and manner in which the floods in the Mississippi Valley may be controlled by proper forestry practice.

SEC. 11. That the Secretary of War shall cause the Mississippi River Commission to make an examination and survey of the Mississippi River below Cape Girardeau, Missouri, (a) at places where levees have heretofore been constructed on one side of the river and the lands on the opposite side have been thereby subjected to greater overflow, and where, without unreasonably restricting the flood channel, levees can be constructed to reduce the extent of this overflow, and where the construction of such levees is economically justified, and report thereon to the Congress as soon as practicable with such recommendations as the commission may deem advisable; (b) with a view to determining the estimated effects, if any, upon lands lying between the river and adjacent hills by reason of overflow of such lands caused by the construction of levees at other points along the Mississippi River, and determining the equities of the owners of such lands and the value of the same, and the commission shall report thereon to the Congress as soon as practicable with such recommendation as it may deem advisable: *Provided,* That inasmuch as the Mississippi River Commission made a report on the 26th day of October, 1912, recommending a levee to be built from Tiptonville, Tennessee, to the Obion River in Tennessee, the said Missis-

sippi River Commission is authorized to make a resurvey of said proposed levee and a relocation of the same if necessary, and if such levee is found feasible, and is approved by the board created in section 1 of this Act, and by the President the same shall be built out of appropriations hereafter to be made.

SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

SEC. 13. That the project for the control of floods in the Sacramento River, California, adopted by section 2 of the Act approved March 1, 1917, entitled "An Act to provide for the control of the floods of the Mississippi River and of the Sacramento River, California, and for other purposes," is hereby modified in accordance with the report of the California Débris Commission submitted in Senate Document Numbered 23, Sixty-ninth Congress, first session: *Provided,* That the total amounts contributed by the Federal Government, including the amounts heretofore contributed by it, shall in no event exceed in the aggregate $17,600,000.

SEC. 14. In every contract or agreement to be made or entered into for the acquisition of land either by private sale or condemnation as in this Act provided the provisions contained in section 3741 of the Revised Statutes, being section 22 of title 41 of the United States Code shall be applicable.

Approved, May 15, 1928.

APPENDIX B

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri. *George W. Kirk, complainant*, v. *James W. Good, Secy. of War; Maj. Gen. Edgar Jadwin, Mississippi River Commission; Brig. Gen. T. H. Jackson, Charles H. West, Robert L. Faris, Edward Flad, John H. Stipes, Col. Edward H. Schulz, and Maj. Ernest Graves, members of Mississippi River Commission; the United States Government, defendants.* No. 349

Plaintiff's application for a temporary injunction, and defendants' motion to dismiss the bill were submitted to the court at the same time. The motion to dismiss will be sustained for the following reasons:

First. The United States is not subject to be sued by a citizen except where it has granted consent and there is no claim that such has been granted in this instance. Before such a suit may be maintained it is incumbent upon the plaintiff to indicate that the authority to sue exists and to bring himself clearly within the privilege.

Second. Officers of the United States are not subject to suit by a private party where no personal judgment is sought and such officers have no individual interest in the controversy, but where the United States is the only real party in interest and

against whom alone the relief sought is effective. *Belknap* v. *Schild*, 161 U. S. 10, 40 L. ed. 599; *Louisiana* v. *McAdoo*, 234 U. S. 633, 59 L. ed. 1506.

Third. Moreover, the bill does not assail the Flood Control Act. Such a purpose is expressly disclaimed. It does not allege that defendants are proceeding outside the statute, but on the contrary the averment is that defendants are engaged in carrying out the plan of flood control adopted by Congress. No act amounting to a wrongful invasion of plaintiff's rights is alleged to have been committed or threatened, and clearly no cause of action for the relief prayed is stated.

Fourth. The awarding of the contracts for the construction of the set-back levee, and the execution of said contracts are not alleged to result in the appropriation, and will not in fact, result in the taking of any part of plaintiff's land. The effects of the adoption of the flood-control plan of which plaintiff now complains, viz, the inability to sell his property or to borrow money on the security thereof, are mere consequential damages such as the prospective construction of any great public work is likely to entail, and for which relief is not afforded. Therefore, the remedy of injunction, if otherwise available, is foreclosed. *Manigault* v. *Springs et al.*, 199 U. S. 473, 50 L. ed. 274; *Gibson* v. *U. S.*, 166 U. S. 269, 41 L. ed. 996.

Fifth. The court ought not, and will not, anticipate that defendants in the future, without instituting and prosecuting a condemnation proceeding in the manner provided by law, will appropriate plaintiff's property by removing any part of the present levee along the west bank of the Mississippi

River, and thereby flood plaintiff's land. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935.

Sixth. Plaintiff has a complete and adequate remedy at law. The Flood Control Act, and the existing statutes made available thereby, provide a full measure of relief.

A decree denying the application for a temporary injunction and dismissing plaintiff's bill may be tendered.

CHARLES B. DAVIS,
U. S. District Judge.

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